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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID RANDOLPH GRAY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ Of Certiorari
To The Mississippi Supreme Court

REPLY BRIEF FOR PETITIONER

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I. ARGUMENT

A. THE TRIAL COURT ERRED IN EXCUSING JUROR BOUNDS FOR CAUSE BECAUSE, AS FOUND BY THE MISSISSIPPI SUPREME COURT, THE JUROR COULD HAVE ACTED IMPARTIALLY IN DETERMINING SENTENCE AND, THUS, WAS QUALIFIED UNDER WITT AND ADAMS.

The Respondent has argued that the harmless error issue before the Court should not be reached because the trial court's decision to excuse the questioned juror, Mrs. Bounds, was not error. Adoption of this alternative ground renders the Mississippi Supreme Court's avoidance of *Davis* v. *Georgia*, 429 U.S.122, 97 S.Ct. 399, 450 L.Ed.2d 339 (1976), superfluous. Analysis of the questioning of Mrs. Bounds and of the Mississippi Supreme Court's application of *Wainwright* v. *Witt*, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), reveals that the excusal for cause of Mrs. Bounds was error.

The questioning of prospective jurors prior to Mrs. Bounds was convoluted and confusing. (Se, e.g., J.A. 5 and 10.) The questioning of Mrs. Bounds continued this trend. Mrs. Bounds' responses reflected her confusion. At times, she gave responses that qualified her as a juror. At other times, her responses were more equivocal.

Fortunately, the trial court, through its running commentary, has provided this Court with an assessment of Mrs. Bounds' ability to be seated as a juror. The trial judge's comments reveal that Mrs. Bounds was improperly excused for cause.

At the outset, the prosecutor questioned Mrs. Bounds in his search "to find twelve people who tells (sic) [him] that they have no conscientious scruples against Capital Punishment when imposed by law." (J.A. 16). While this

search may have suited the prosecutor's purpose, it was not consistent with the parameters set out in *Witt*.

Witt does not require the exclusion of all prospective jurors who have conscientious scruples against the death penalty. A juror may only be excluded if he maintains principles that would "prevent or substantially impair the performance of his duties as . . . a juror in accordance with his instructions and oath." *Witt*, 105 S.Ct. at 852. A scrupled juror may agree to set aside his or her scruples in deference to the law. He would then be qualified to sit as a juror.

The trial court interceded and asked Mrs. Bounds, "Would you automatically vote against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial in this case?" Mrs. Bounds responded appropriately, "I would try to listen to the case." (J.A. 17).

Mrs. Bounds was directed to respond, yes or no. She responded appropriately again, "No, sir." (J.A. 17).

The prosecutor was allowed to question Mrs. Bounds again. This time she equivocated and did not think she could impose the death penalty. The prosecution then moved to strike Mrs. Bounds for cause. (J.A. 19-20).

In response, the trial judge stated his assessment of Mrs. Bounds' ability to be seated as a juror. The trial judge here stated, "Well, I don't know whether she could or couldn't [impose the death penalty]. She told me she could, a while ago." (J.A. 20).

It is clear, to this point, that the prosecutor, the party that requested Mrs. Bounds' excusal, had not carried its burden. See, *Witt*, 105 S.Ct. at 852 ("As with any other trial situation where an adversary wishes to exclude a

juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. See *Reynolds* v. *United States*, 98 U.S. 145, 157, 25 L.Ed. 244 (1879).". The remainder of Mrs. Bounds' questioning did not provide a proper basis for her excusal.

The trial judge again took up the questioning of Mrs. Bounds. He began by indicating that her honesty and sincerity were not in question. (J.A. 20). Mrs. Bounds then indicated that she would neither automatically vote for the death penalty (J.A. 21) or automatically vote against it. (J.A. 21-22).

The prosecutor now realized that Mrs. Bounds could not properly be struck for cause and moved the court to reverse its prior rulings (J.A. 23) so that a peremptory challenge would be returned to the State for use against Mrs. Bounds.[1]

The trial court directed the prosecutor to question Mrs. Bounds further. The final set of questions put to Mrs. Bounds follows.

> BY MR. NECAISE: Mrs. Bounds, do you feel like this is a case, and I don't, I certainly don't want you to think that I'm picking on you. But, uh, what we are trying to do here is that we are trying to pick twelve people, uh, who we feel that, uh, would be fair and impartial persons, what we are looking for is people who could be fair and impartial and who could, if the evidence warranted it, could impose the Death Penalty because we feel that this a case that warrants the imposition of the Death Penalty. We know that

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[1] By this point, the prosecutor had used his entire allotment of twelve (12) peremptory challenges. Five peremptory challenges were involved in the prosecutor's request.

the law allows it. And could you tell me, do you feel like you could reach a verdict in this case, either guilty or not guilty in this case?

BY MRS. BOUNDS: Could I reach a verdict?

BY MR. NECAISE: A verdict.

BY MRS. BOUNDS: A verdict?

BY MR. NECAISE: Yes, ma'am.

BY MRS. BOUNDS: Either way?

BY MR. NECAISE: Yes, ma'am.

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evidence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the Death Penalty on this twenty-eight year old Defendant?

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: Ma'am?

BY MRS. BOUNDS: Yes.

BY MR. NECAISE: Judge, the lady says yes, but we would challenge her for cause.

(J.A. 23-24)

The trial judge then, over objection, excused Mrs. Bounds for cause because she was "indecisive." (J.A. 26).

The prosecution failed to carry its burden of proof. Mrs. Bounds was excused for an improper reason. "[S]he was clearly qualified to be seated as a juror under the *Adams*

and *Witt* criteria." *Gray* v. *Mississippi*, 472 So.2d 409, 422 (Miss. 1985). The trial court's decision constituted error.

B. THE RECORD HERE DOES NOT SUPPORT RESPONDENT'S CONTENTION THAT THE TRIAL COURT WAS INTENT UPON VIOLATING THE LAW BY REFUSING ALL CHALLENGES FOR CAUSE MADE BY THE STATE.

Next, Respondent has argued that the Mississippi Supreme Court has misconstrued the actions and intent of the trial court when the trial court refused to excuse certain jurors for cause. The Mississippi Supreme Court considered the rulings to have been based upon the trial court's assessment of the credibility of the prospective jurors. *Gray*, 472 So.2d at 421. Respondent argues that the trial court was simply intent upon denying all cause challenges made by the State.

In Mississippi, as in other states, trial judges take an oath to uphold the law.[2] The Respondent has asked this Court to presume that the trial judge in this case intentionally violated his oath of office.

In its brief, the Respondent has argued that references by the trial judge to "cheating" the State (Resp. Brief at 18), clearly establish that the trial judge, from the outset, was intent upon violating the law by purposely refusing to excuse any jurors for cause, no matter the clarity of the juror's bias. The record before this Court is simply insufficient to support the Respondent's contention.[3]

At the time of the trial judge's reference to "cheating" the State, the trial court was clearly given the oppor-

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[2] Mississippi Constitution, Article 6, § 155.

[3] Indeed, the trial court granted a challenge for cause made by the State against prospective juror Schleh (T. 504-506).

tunity to reverse its previous rulings if the court felt that the prior rulings were erroneous. The correction could have been accomplished by granting the State's motion to reverse one of the earlier rulings that denied the State's challenges for cause. (J.A. 23). The judge refused to alter his earlier rulings. (J.A. 26). Thus, it cannot be stated with confidence that the judge considered the jurors in question unqualified and nonetheless ignored the law and refused to excuse them for cause.

If a presumption is to be entertained, it must be presumed that the trial court acted in accordance with the law. *Witt*, 105 S.Ct. at 856; *Marshall* v. *Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 850, 74 L.Ed.2d 646 (1983); *LaValle* v. *Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973); and *Townsend* v. *Sain*, 372 U.S. 293 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). This better explains the court's actions and establishes that the court acted consistent with its duty to err, if at all, on the side of the accused.

The trial judge may have cheated the State by deciding questionable issues in the Petitioner's favor. This, however seemingly unfair, was precisely the court's duty. *Witt*, 105 S.Ct. at 855 ("We reiterate what this Court stressed in *Dennis* v. *United States*, 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed. 734 (1950): '[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor. . . . In exercising its discretion, the trial court must be zealous to protect the rights of an accused.'").

The Mississippi Supreme Court, presumably cognizant of the trial court's oath of office and prior practices, found that the jurors in question were retained because their

attestations were considered insincere by the trial court.[4] On the state of this record, this Court should not disturb that finding.

C. THE AMICI CURIAE HAVE ARGUED THAT THE PROCEDURES APPLICABLE TO THE PRESERVATION OF JURY ERROR IN NON-CAPITAL CASES SHOULD BE APPLIED HERE. THE PREMISE UPON WHICH THE AMICI CURIAE'S ARGUMENT IS BASED IS FALLACIOUS AS THE FACTFINDING AND LIMITED SENTENCING FUNCTIONS OF NON-CAPITAL JURIES ARE VASTLY DIFFERENT FROM THE DISCRETIONARY FUNCTIONING OF A JURY IN A CAPITAL SENTENCING PROCEEDING.

The Amici Curiae have argued that the nature of a jury's role in a capital trial and sentencing proceeding is similar to the role of a jury in a non-capital case. (Amici Curiae, hereafter, A.C., Brief at 4). In non-capital trials, the argument continues, "most states, by statute, court rule, or case decision, require a defendant seeking reversal of his conviction or vacation of his sentence based upon the erroneous grant or denial of a challenge to a venireman to demonstrate some prejudice to the defense by the trial court's erroneous action." (A.C. Brief at 5). As the roles of the capital and non-capital juries are similar, capital defendants should also be required to establish prejudice.

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[4] It is interesting to note that Respondent made this argument before the Mississippi Supreme Court and asked that court to officially condemn the practice of trial courts refusing to grant meritorious cause challenges. (Appellee Brief filed by Respondent before the Mississippi Supreme Court at 15). The Mississippi Supreme Court declined comment on the issue.

Although apparently logical on its face, analysis of the argument put forth by the Amici Curiae reveals that the basic assumptions upon which the argument is based are inaccurate. The vast majority of states that require a showing of prejudice (See, A.C. Brief at 6, fn. 1) do not allow juries to determine felony sentences. See, e.g., *State* v. *McMillian*, 28 N.C. App. 308, 220 SE.2d 825 (1976). Further, in the few states that still have jury sentencing, the proceedings there involved are not the equivalent of capital sentencing.

The factfinding function of a jury in determining guilt is vastly different from the discretionary function involved in determining an appropriate sentence that accurately represents the conscience and morals of the community. See, e.g., *Adams* v. *Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). The treatment of state appeals involving juries that engage solely in factfinding is irrelevant to the instant capital sentencing issue.

The few states that permit juries in non-capital cases to determine sentences, do so under circumstances very different from capital cases. For example, the concept of mercy plays a much more important role in death penalty cases than in non-capital cases. In Mississippi, as in other states, a capital jury is free to impose a sentence of life even if the aggravating factors outweigh the mitigating factors. *Coleman* v. *State*, 378 So.2d 640 (Miss. 1979).

Capital jury sentencing is generally accomplished in a bifurcated proceeding. This is not true in non-capital sentencing. Also the variety of evidence admissible in mitigation is much greater than that generally seen in non-capital cases.

Finally, in the capital sentencing area, a defendant is entitled to have his trial subjected to a greater degree of scrutiny than in non-capital cases. *Turner* v. *Murray*, 476

U.S. ___, 106 S.Ct. 683, 90 L.Ed.2d 77 (1986), Sentences of death must meet an enhanced standard of reliability. *Woodson* v. *North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (Plurality opinion).

Capital sentencing occurs in a special context. Nowhere is it more important that the actuality and appearance of fairness be protected. Conclusions about appropriate procedures in non-capital cases are neither relevant or controlling in capital sentencing and should not be adopted here.

D. CAPITAL SENTENCING OCCURS IN A SPECIAL CONTEXT WHERE A JURY'S DECISION IS A REFLECTION OF A COMMUNITY'S MORALITY AND IS HIGHLY DISCRETIONARY. AS SUCH, AN APPELLATE COURT CANNOT CONFIDENTLY FIND THAT AN ERROR COMMITTED IN THE EXCUSAL OF A JUROR FOR CAUSE WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Respondent here argues that "the exclusion of Juror Bounds did not violate fair cross section standards as *Witherspoon* excludables do no constitute a distinctive group. *Lockhart* v. *McCree*, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)." (Resp. Brief at 31-32).[5] The Amici

[5] In part, Respondent has also argued that the instant case is distinguishable from *Davis* v. *Georgia* because the Mississippi Supreme Court did not engage in a harmless error analysis. Rather, the Mississippi Supreme Court merely allowed the trial judge to correct his previous error. (Resp. Brief at 23). Had the trial court acted as Respondent argues, Petitioner would probably not have sought certorari on this issue. The trial court had the opportunity to clearly acknowledge that its earlier rulings were erroneous and to reverse those rulings. (J.A. 23). The court refused to do so. (J.A. 26). Rather, it improperly excused Mrs. Bounds for cause. Assuming *arguendo*, that the prior rulings were erroneous, capital sentencing cases are hardly an appropriate vehicle for this Court to adopt the concept of "off-setting penalties" as apparently sought by Respondent.

Curiae have argued similarly. (A.C. Brief at 9-10). Both the Amici Curiae and the Respondent have confused the Court's comments in *Lockhart*.

In *Lockhart* v. *McCree*, this Court continued to recognize the vital distinction between the factfinding role of a capital jury in determining guilt or innocence and the discretionary function involved in capital sentencing. The two functions are separate and distinct and require different analyses.[6] As to factfinding, *Witherspoon* excludables do not form a cognizable group. However, as to sentencing, the improper exclusion of scrupled jurors can lead to a constitutionally cognizable imbalance of views.

Rather than foreclosing Petitioner's arguments, this Court's opinions of last term as well as the continued development of *Witherspoon-Adams-Witt*, argue strongly for Petitioner's position.[7] That is, the rule of *Davis* v. *Georgia*, supra, should be preserved.

Witherspoon,[8] did not create a ground for excluding jurors. Rather, it created a boundary that the states may

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[6] See *Lockhart*, 106 S.Ct. at 1769 ("[B]oth *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced' jury.") and Id., 106 S.Ct. at 1770 ("In the case at bar, by contrast, we deal not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant, where jury discretion is more channeled.").

[7] For example, *Rose* v. *Clark*, 54 USLW 5023, 5025 (Decided July 2, 1986) specifically references the factfinding function of a trial and states that harmless error analysis presumably applies to all alleged error if the defendant had counsel and was tried by an impartial adjudicator. *Davis* v. *Georgia*, supra, dealt with errors during the selection of an impartial adjudicator and related to sentencing, not factfinding.

[8] 391 U.S. 510, 88 S.Ct. 1779, 20 L.Ed.2d 776 (1968).

not transgress in their efforts to obtain impartial juries. *Adams* v. *Texas*, 448 U.S. at 48-49, 100 S.Ct. at 2528.

The progression from *Witherspoon* to *Witt* has served to soften the initial dictates of *Witherspoon*. As to sentencing, under *Witherspoon*, only those persons who would automatically vote against the death penalty could properly be excluded. Today, under *Witt*, it is only necessary to show that a juror's beliefs would substantially impair his performance.

The impact of *Witt* is to make more jurors subject to exclusion. Conversely, applying *Witt*, fewer errors are likely to occur. The errors that do result, however, are likely to be more egregious. The reason for this is twofold.

First, because the *Witt* standard is easier to apply and allows for broader exclusions, a trial judge is given much greater latitude before his error is recognized. The transgression must be greater than that recognized under *Witherspoon*.

Second, with the broader exclusions permissible under *Witt*, fewer attitudes and beliefs are actually represented on a particular jury. No longer are merely the outer most fringes excluded. Now, juries are apt to be more homogeneous and, as a consequence, less representative of the full spectrum of community attitudes. This detracts from the quality of deliberations and undercuts the ability of a particular jury to represent the conscience of the community from which it was drawn.[9]

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[9] See, *Ballew* v. *Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) and Cowan, Thompson and Ellsworth, The Effect of Death Qualification on Juror's Predisposition to Convict and on the Quality of Deliberation, 8 Law and Human Behavior 53-79 (1984).

In *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) this Court recognized that trials need not be perfect. Constitutional errors may occur and may be proven harmless beyond a reasonable doubt. Convictions entered after trials that contained harmless errors may stand.

This Court, as recently as last term, recognized that in determining the propriety of a sentence of death, a jury exercises a unique, individualized discretionary function. *Turner* v. *Murray*, supra. See also, *Caldwell* v. *Mississippi*, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This function is not readily subject to harmless error review.

The Respondent and Amici Curiae have argued that the error in excusing Mrs. Bounds for cause was harmless. However, nothing in either the Respondent's brief or in the brief submitted by the Amici Curiae establishes that the error did not affect jury deliberations, the appearance of fairness or the actual outcome. If such arguments had been proposed, discussion could then move to the question of whether the error was harmless beyond a reasonable doubt.

The nature of the jury's sentencing decision precludes discussion of the impact of errors. Individualized, highly discretionary jury sentencing decisions are, almost by definition, insulated from the meticulous analysis required to determine that constitutional errors are harmless.

The per se rule announced in *Davis* v. *Georgia* is consistent with the capital sentencing jurisprudence that has developed since 1976. *Davis* v. *Georgia* should be preserved.

II. CONCLUSION

For the foregoing reasons, this Court should remand the instant matter for a new sentencing proceeding.

Respectfully submitted,

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